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No. 86-741

In the Supreme Court of the United States

OCTOBER TERM, 1986

MANUEL BINKER, AKA MANOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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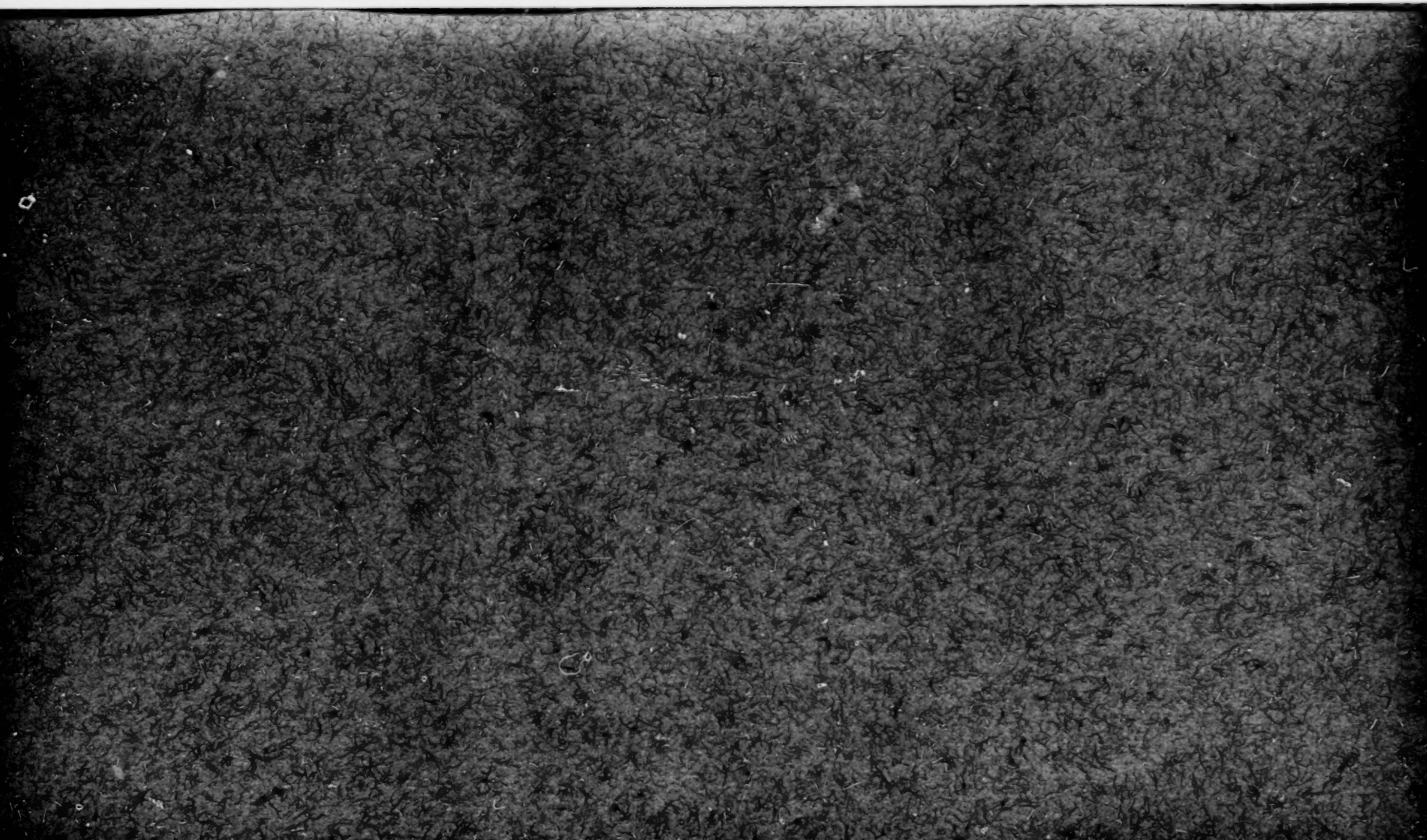

QUESTION PRESENTED

Whether petitioner's marijuana smuggling conviction should be reversed because, in response to defense arguments that government witnesses had lied, the prosecutor referred to provisions in the witnesses' guilty plea agreements that required them to testify truthfully.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 795 F.2d 1218.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1986. On September 26, 1986, Justice White extended the time within which to file a petition for a writ of certiorari to and including November 3, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of conspiring to import and distribute marijuana, in violation of 21 U.S.C. 846 and 963. He was given consecutive sentences of 5 years' imprisonment and a $15,000 fine on the distribution conspiracy count, and 15 years' imprisonment and a $125,000 fine on the importation conspiracy count. Pet. App. A11.

1. In June 1984 the Coast Guard searched a vessel named the HARRY I and discovered a large quantity of marijuana concealed under a load of rotting mangoes. The Coast Guard seized the vessel and arrested the crew. Petitioner and seven others who were not on the vessel when it was seized were subsequently indicted because of their involvement in the scheme to import marijuana on the vessel. All except petitioner entered pleas of guilty, and six of the others appeared as government witnesses at petitioner's trial and testified pursuant to plea agreements. Pet. App. A6-A7.

Faiz Sikaffy testified that he was petitioner's partner in various marijuana smuggling ventures, including those involving the HARRY I and another vessel named the MARENOSTRUM.[1] He explained that, after purchasing the HARRY I for the purpose of shipping seafood, he and petitioner decided to use it to import marijuana. His role was to transport the marijuana, and petitioner's role was to sell it. In May 1984, petitioner traveled to Haiti to prepare the HARRY I to sail to Colombia, where it was to

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[1] Petitioner was acquitted on counts alleging his participation in a scheme to import marijuana on the MARENOSTRUM (Pet. App. A7). No marijuana was ever found on that vessel (*id.* at A23 n.8).

receive a load of marijuana. On the trip, petitioner was accompanied by Sikaffy and two other conspirators—William Earle and Miguel Suriano. As part of their preparations, the conspirators purchased a supply of mangoes and straw goods to hide the cargo. After the HARRY I rendezvoused at sea with a Colombian vessel and received the marijuana, petitioner and Sikaffy arranged to have part of it loaded onto another vessel, the SEACRUST, and sold to Hector Perez. Before the rest of the marijuana could be distributed, however, the Coast Guard seized the HARRY I. Pet. App. A7-A8.

Sikaffy's testimony was corroborated by Perez, Suriano, Earle, and Miguel Canahuati. Perez confirmed that he received approximately 6,800 pounds of marijuana for which he paid petitioner. Suriano confirmed that he went to Haiti to assist in preparations for the importation and that he and petitioner purchased the mangoes and straw products for the purpose of concealing the marijuana.[2] Earle, a pilot,

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[2] Contrary to his trial testimony, Suriano had told the grand jury that he did not know whether petitioner was aware of the purpose to be served by the mangoes and straw products. The prosecution and the defense entered the following stipulation concerning his testimony on that point (Pet. App. A25):

> It is stipulated that if Faiz Sikaffy was called to the stand in the case, he would testify that Assistant United States Attorney Marilyn Barnes told him [shortly before the trial] that he could tell Miguel Suriano, if you saw him in the jailhouse that night, that Marilyn Barnes said he was lying, and as far as she was concerned, Suriano could get ready to go to trial, the Government just wasn't going to tolerate such nonsense.

Although the stipulation was read to the jury during the defense case, petitioner never sought any relief at trial relating to the stipulation, such as an instruction to the jury or an order striking Suriano's testimony (*ibid.*).

testified that he served as an aerial observer during the HARRY I's rendezvous with the SEACRUST. Canahuati recounted his trip to Venezuela and Colombia to inspect the marijuana that was to be imported as well as a subsequent trip he made to Florida to report his findings to Sikaffy. Finally, Josefina Caporale, Sikaffy's secretary, explained how she delivered $10,000 from petitioner as legal fees for the crew of the HARRY I and how, on previous occasions, petitioner had delivered large sums of money to Sikaffy. Pet. App. A9-A10.

2. The witnesses' plea agreements all contained a provision requiring them to testify truthfully. The agreements also provided that the government retained the right to verify the testimony. During their testimony, the government elicited from each witness a description of his promise to testify truthfully in exchange for reduced charges and the government's promise to inform the sentencing judge of the witness's cooperation. After the defense utilized the agreement on cross-examination to challenge each witness's testimony, the government introduced the plea agreements on redirect examination over petitioner's objection. Pet. App. A13.[3]

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[3] Caporale testified pursuant to an immunity agreement that contained a provision not found in the other agreements. The provision in Caporale's agreement stated that " '[t]hus far, we have found that what you have told us has been the truth and we have been able to independently corroborate (verify) it.' " Pet. App. A12 n.2 (emphasis omitted). When Caporale's agreement was introduced, petitioner's attorney objected to its admission " '[s]ubject to the same objection' " that he had made to the other agreements. Although petitioner subsequently challenged the use of the agreements in a motion for a new trial, he did not distinguish between the terms of

During the government's closing argument, the prosecutor responded to petitioner's suggestions during cross-examination that the plea agreements provided an incentive to lie. The prosecutor adverted to the provision requiring the witnesses to testify truthfully and stated (Pet. App. A14):

> Ladies and gentlemen, look at those plea agreements, do these plea agreement[s] provide a motive to lie, or do they provide a motive to tell the truth? These witnesses said that if they lied, they would be charged with perjury, ladies and gentlemen, that's part of their plea agreement. Their plea agreement said if they lied, that plea agreement could be withdrawn, they could stand trial, the deal was off. Ladies and gentlemen, is that a motive to lie, or is that a motive to tell the truth, to testify truthfully.

During petitioner's summation, his attorney expressed the view that the witnesses who testified pursuant to the plea agreements had committed perjury and that their testimony had been coerced by the government. The government responded by referring once more to the terms of the agreements, and the following colloquy ensued (Pet. App. A16):

> [Prosecutor]: Now, the one thing that's all going to get them back to where they were facing the original time they were facing, they were told, and you decide from listening to those people on the stand, whether or not they believed it, if they were lying the deals were off. You have had evidence whether or not the Government enforced that, you decide—

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those of the co-defendants and that of Caporale until he filed a motion for reconsideration of the denial of his new trial motion. Pet. App. A21-A22.

[Defense counsel]: Your honor, I object to the argument.

[The Court]: Objection overruled.

[Prosecutor]: You decide if these people believed it and were acting accordingly. And in fact, lying is one thing that is going to get them right back where they were before.

3. On appeal, petitioner argued that the introduction of the witnesses' plea agreements and the prosecutor's statements during summation referring to the agreements constituted improper vouching as to their credibility. The court of appeals rejected that claim, reasoning that the agreements were introduced only after the defense had cross-examined the witnesses about the agreements in a manner that challenged the witnesses' credibility, and that the prosecutor's statements concerning the requirement that the witnesses testify truthfully was a proper rebuttal to the defense arguments. Pet. App. A16-18.

The court acknowledged that the prosecutor's statement during her rebuttal that " '[y]ou have had evidence whether or not the Government enforced that,' " an apparent reference to the government's right to verify the witnesses' testimony, came "perilously close to improper vouching" by suggesting that a witness should be believed because the government had independently verified his testimony. The court held, however, that in context the remark was a legitimate response to petitioner's argument that the testimony of government witness Suriano was the result of intimidation by the prosecutor. Pet. App. A18-A20; see note 2, *supra*.

The court also rejected the claim that the distinctive provision in Caporale's immunity agreement (see note 3, *supra*) that " '[t]hus far, we have

found that what you have told us has been the truth and we have been able to independently corroborate (verify) it' " required reversal of petitioner's conviction. Although the court found that the challenged provision constituted impermissible vouching for Caporale's credibility, it held that petitioner was entitled to no relief, for two reasons. First, the court noted, petitioner had failed to direct the trial judge's attention to the provision during trial. Second, the court held, Caporale's testimony merely corroborated the testimony of other witnesses; any improper vouching with regard to Caporale's testimony was therefore harmless. Pet. App. A23.[4]

ARGUMENT

Petitioner contends (Pet. 10-14) that the prosecutor improperly used the "truthful testimony" provisions of the guilty plea agreements to bolster the witnesses' credibility. The court of appeals correctly rejected that claim. As its decision is not in conflict with that of any other court of appeals, further review is not warranted.

It is well established that, when the defense attacks the credibility of a government witness who is testifying pursuant to a guilty plea agreement, the government may rehabilitate the witness by intro-

[4] The court of appeals also rejected petitioner's argument that, prior to trial, the prosecutor coerced government witness Suriano into changing his testimony and testifying against petitioner. The court held that the prosecutor had not acted improperly in attempting to enforce the terms of the plea agreement and that, in any event, the claim came too late since petitioner never sought any relief at trial as a result of the statements the prosecutor communicated to Suriano concerning his grand jury testimony and the plea agreement (Pet. App. A24-A26).

ducing the terms of the agreement, including the provisions requiring the witness to testify truthfully or suffer the loss of its benefits. See, *e.g.*, *United States* v. *Smith*, 778 F.2d 925, 928 (2d Cir. 1985); *United States* v. *Hilton*, 772 F.2d 783, 787 (11th Cir. 1985); *United States* v. *Jones*, 763 F.2d 518, 522 (2d Cir. 1985); *United States* v. *Oxman*, 740 F.2d 1298, 1303 (3d Cir. 1984), vacated on other grounds, No. 84-1033 (July 2, 1985); *United States* v. *McNeill*, 728 F.2d 5, 14 (1st Cir. 1984); *United States* v. *Henderson*, 717 F.2d 135, 137-138 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *United States* v. *Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983). As the court of appeals noted, petitioner's counsel repeatedly emphasized during cross-examination that the government witnesses stood to benefit from the plea agreements and were likely to testify in the manner that would preserve those benefits (Pet. App. A15 n.5; 12 Tr. 665-668, 674, 686). The prosecutor did not offer the plea agreements into evidence until redirect examination, after the defense had exploited the provisions that conferred benefits upon the witnesses. During summation, the prosecutor referred to the "truthful testimony" provisions of the agreements in response to defense counsel's efforts to exploit the agreements on cross-examination and in summation. Under those circumstances, the prosecutor's actions were a proper response to tactics initiated by the defense. See, *e.g.*, *Hilton*, 772 F.2d at 787; *Oxman*, 740 F.2d at 1302-1303 (permitting the government to introduce terms of agreement in anticipation that beneficial features would be exploited by the defense); *Jones*, 763 F.2d at 522.[5]

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[5] *United States* v. *Roberts*, 618 F.2d 530 (9th Cir. 1980), upon which petitioner relies (Pet. 12-13), is not to the con-

Nor did the prosecutor's reference, during her rebuttal summation, to the term of the plea agreements providing for verification of the witnesses' statements deprive petitioner of a fair trial. Although the court of appeals observed that the remark came close to improper vouching for the credibility of one of the government witnesses, it correctly concluded that, taken in context, the remark was an apparent response to the preceding defense

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trary. In that case the court held that the introduction of a "truthful testimony" provision in a plea agreement can sometimes constitute improper vouching for the witness's credibility (618 F.2d at 536-537). However, the *Roberts* court did not address the question whether such terms of a plea agreement may be admitted to rebut arguments by the defense that the benefits of a plea agreement are likely to have prompted the witness to commit perjury. Indeed, in subsequent cases, the Ninth Circuit has approved of the practice of admitting a witness's plea agreement containing a "truthful testimony" provision after defense counsel has exploited the plea agreement to challenge the witness's credibility. See *United States* v. *Rohrer*, 708 F.2d at 433; *United States* v. *Tham*, 665 F.2d 855, 861-862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982). Petitioner also relies upon the concurring opinion in *United States* v. *Arroyo-Angulo*, 580 F.2d 1137 (2d Cir. 1978), for the proposition that it is improper for the prosecutor to refer to the "truthful testimony" provision of a plea agreement (see *id.* at 1149-1150). In that case, however, the majority of the court held that it was permissible for the prosecutor to refer to that provision where, as in this case, the witness's credibility had been challenged on cross-examination by defense counsel (*id.* at 1146). Moreover, the concurring judge did not contend that prosecutors may never refer to the "truthful testimony" provision of a plea agreement, and he did not think that the conviction at issue should be overturned. Rather, he objected to the "excesses" in the particular case and made clear that in his opinion the comments at issue amounted to "prosecutorial overkill" (*id.* at 1150).

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argument. During his summation, defense counsel suggested that Suriano's testimony, which implicated petitioner in the smuggling scheme and was inconsistent with his grand jury testimony, was false and that it was induced by the prosecutor's pretrial threat to withdraw the agreement (see Pet. App. A15 n.5). The prosecutor's ensuing remark merely suggested that, given the terms of the agreement and, in particular, its verification provision, the alleged threat was more likely to have induced Suriano to testify truthfully. Thus, even if the prosecutor's statement would otherwise have amounted to improper bolstering, it was permissible as a rebuttal to petitioner's argument that the prosecutor had induced Suriano to testify falsely. In that context, the prosecutor's argument did no more than " 'right the scale' " that had been tipped by defense counsel's attack on the government witnesses during the defense summation. See *United States* v. *Young*, 470 U.S. 1, 11-13 (1985); *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958); see also *United States* v. *Eley*, 723 F.2d 1522, 1526 (11th Cir. 1984); *United States* v. *Dorr*, 636 F.2d 117, 121 (5th Cir. 1981); *United States* v. *Cotton*, 631 F.2d 63, 65 (5th Cir. 1980), cert. denied, 450 U.S. 1032 (1981). In any event, in view of the trial judge's subsequent instructions cautioning the jury that the arguments of counsel are not evidence, and in light of the strength of the government's case against petitioner, the statement plainly did not constitute reversible error. See, *e.g.*, *United States* v. *Alonso*, 740 F.2d 862, 874 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); *United States* v. *Phillips*, 664 F.2d 971, 1031 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Cotton*, 631 F.2d at 66; Fed. R. Crim. P. 52(a).

Petitioner also notes (Pet. 14) that the immunity agreement executed by Caporale contained the statement that the government had independently corroborated her story. But as the court of appeals observed (Pet. App. A20-A22), defense counsel did not focus the trial court's attention on that feature, which was unique to Caporale's agreement. Petitioner is therefore foreclosed from raising it now. Furthermore, since Caporale's testimony concerning petitioner's role in the importation scheme was relatively insignificant, and since the statement in the plea agreement that the government had verified her statements was at no time called to the jury's attention (*id.* at A23), that provision could not have affected the fairness of the trial. See Fed. R. Crim. P. 52(a).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987

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[6] Although petitioner included among his "questions presented" an issue concerning the propriety of the prosecutor's alleged threat to withdraw the benefits of Suriano's plea agreement unless he testified differently than he did before the grand jury, he did not address the matter in his petition. In any event, as the court below observed (Pet. App. A25), petitioner failed to seek any relief at trial as the result of the alleged threat, so his complaint on that issue is too late.

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